Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

even that the state was not a necessary party, the court was not justified by the precedents in considering the suit not to be against the state. For it seems to fall on the same side of the line as the cases which hold that a court has no jurisdiction to issue a mandate which virtually enforces the contract of the state,[8] or compels affirmative action on the part of officials not charged with a clear ministerial duty,[9] or affects the property of the state in the hands of its agents,[10] or compels payment from the state's funds,[11] or imposes a trust on the state's property.[12] On the other hand, this suit seems distinguishable from one against a corporation of which the state is a member,[13] since here the state has direct ownership of at least the surplus; or from a proceeding to determine the state's interest in a *res* not in its possession;[14] or from an action of ejectment against state officers when the state shows no *prima facie* title.[15] The two chief authorities for the court's position are early cases[16] in the circuit courts, scarcely mentioned in later discussions. Moreover, if an agency, not an assignment, should be found here, the result appears still less tenable.

The court hints at another ground for the decision, namely, that liquor selling is not a governmental function,[17] and hence not intended by the adopters of the Eleventh Amendment to be protected from judicial interference. It is true that dicta have occurred to the effect that a state loses its sovereignty when it steps down into the marketplace.[18] But no case will be found depriving a state of immunity from suit on this ground alone. Doubtless the constitutional prohibition cannot thus be narrowed in application; for it is based on an actual lack of power rather than a theory of government.[19]

FORMATION OF A CORPORATION FOR THE PURPOSE OF EFFECTING DIVERSITY OF CITIZENSHIP. — Questions of federal jurisdiction over corporations under the diversity of citizenship clause first arose at a time when the federal judiciary was as anxious to extend its jurisdiction as it is now to restrict it. Although corporations are not citizens within the meaning of the Constitution, this did not prove fatal to federal jurisdiction, since the courts early declared that the stockholders were the real parties in interest and their citizenship the determining factor.[1] The further difficulty, that

---

[8] Louisiana *v.* Jumel, 107 U. S. 711.

[9] Farmer's Nat'l Bank *v.* Jones, 105 Fed. 459.

[10] Christian *v.* Atlantic, etc., R. Co., 133 U. S. 233. *Contra,* Sinking Fund Com'r's *v.* No. Bank, etc., 1 Metc. (Ky.) 174.

[11] Brown University *v.* Rhode Island College, etc., 56 Fed. 55.

[12] Lowry *v.* Com'r's Sinking Fund, 25 S. C. 416; Bd. Public Works *v.* Gannt, 76 Va. 455. *Contra,* Preston *v.* Walsh, 10 Fed. 315; Chaffraix *v.* Bd. Liquidation, 11 Fed. 638.

[13] Southern R. Co. *v.* North Carolina R. Co., 81 Fed. 595.

[14] U. S. *v.* Peters, 5 Cranch (U. S.) 115; Swasey *v.* North Carolina R. Co., Fed. Cas. No. 13679.

[15] Tindal *v.* Wesley, 167 U. S. 204.

[16] Chaffraix *v.* Bd. Liquidation, *supra;* Preston *v.* Walsh, *supra.*

[17] *Cf.* South Carolina *v.* United States, 199 U. S. 437. But see Vance *v.* Vandercook, 170 U. S. 438; State *v.* Aiken, 42 S. C. 222.

[18] See Charleston *v.* Murray, 96 U. S. 432; Bank of United States *v.* Planter's Bank of Georgia, 9 Wheat. (U. S.) 904; The Floyd Acceptances, 7 Wall. (U. S.) 666.

[19] See Kawananakoa *v.* Polyblank, 205 U. S. 349.

[1] Bank of U. S. *v.* Deveaux, 5 Cranch (U. S.) 61. When the corporate fiction was thus disregarded in an action at law it was in open violation of the principle that that

the stockholders might be citizens of different states was surmounted by the introduction of the artifice, now settled law, that for the purpose of acquiring jurisdiction the stockholders are conclusively presumed to be citizens of the state of incorporation.[2]

In a recent case the officers and stockholders of a California corporation, in order to bring into the federal courts an action against a California citizen concerning certain land, organized in Nevada a new corporation, to which the old corporation transferred the land, and the stock in the new corporation was issued to the old. The court dismissed the suit as collusive and fraudulent on its jurisdiction. *Miller & Lux* v. *East Side Canal, etc., Co.*, U. S. Sup. Ct., December 7, 1908. The new corporation is legally a distinct person from the old, and a diversity of citizenship between it and the opposing party *prima facie* exists. But there is a rule that if a litigant is not the real person in interest, but appears merely for purposes of acquiring jurisdiction, there being no diversity between the real parties, the case will be dismissed as an attempted fraud on the court's jurisdiction.[3] And the court, having once decided to disregard the corporate entity in order to obtain jurisdiction, is taking no greater step to do so in order to refuse jurisdiction, if collusion or fraud is apparent.

The test for fraud where land is conveyed from one individual to another for the purpose of getting into the federal courts is the reality of the transfer.[4] No matter what the motive, if the title is really passed, free from any secret trust or agreement to reconvey, the grantee's right to sue or be sued there cannot be denied.[5] This would seem to apply even where the transferee is a corporation organized for the purpose; for, unless its stockholders are themselves the original owners of the property, there is in fact as well as in law a new owner. But if both grantor and grantee are corporations, with the same officers and stockholders, the grantee having been organized for the collusive purpose, the validity of its ownership is open to attack; for when the veil is drawn it is plain that the person really benefited is the old corporation, that the stockholders control the disposition of the property, and that they can and probably will, effect a reconveyance when the suit terminates. The transaction is no more than a clever and fraudulent scheme to get into the federal courts.[6] To prevent the perpetration of such a fraud, the court may well feel justified in disregarding the fiction, and in thus extending a well-settled but anomalous rule to cases better fitted for its application than those which established the rule itself. The present decision, therefore, is thoroughly desirable.[7]

The opinion intimates that had the old corporation been dissolved before the suit by the new company was begun, a different decision might have been reached. This seems correct, as the transfer would then appear to be real in fact as well as in law.

---

step should be taken only in equity (except in the case of *quo warranto* proceedings. See People *v.* North River Sugar, etc., Co., 121 N. Y. 582).

[2] St. Louis & San Francisco Ry. *v.* James, 161 U. S. 545, 562.

[3] An Act of Congress orders the dismissal of a suit at any stage of the proceedings, when such fraud or collusion appears. 18 Stat. 460, 472.

[4] Barney *v.* Baltimore City, 6 Wall. (U. S.) 280; Hurst's Lessee *v.* McNeil, 1 Wash. C. C. (U. S.) 70.

[5] McDonald *v.* Smalley, 1 Pet. (U. S.) 620.

[6] Lehigh Mining & Mfg. Co. *v.* Kelly, 160 U. S. 327.

[7] The suit was in equity, but the court does not notice this distinction, and would probably have reached the same result if the action had been at law. See Lehigh Mining & Mfg. Co. *v.* Kelly, *supra*.